No. 150.

Petition for Rehearing.

Rec'd & Dist'd May 21, 189

Supreme Court of the United States.

No. 150, OCTOBER TERM, 1897.

HUMES, Plaintiff in Error, vs. THE UNITED STATES	Error to the Circuit Court of the United States for the Western District of Tennessee

PETITION AND BRIEF FOR RE-HEARING BY PLAINTIFF IN ERROR.

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Counsel for Plaintiff in Error.

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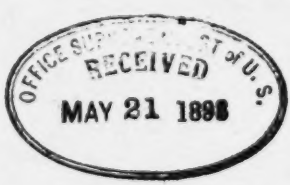

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JAMES M. GREER.
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PETITION FOR REHEARING BY PLAINTIFF IN ERROR.

Your petitioner most humbly prays for a rehearing in his case.

The judgment was rendered herein on towit Monday, April 25th, 1898. It is on section 5485 R. S. which, as we understand, contains two clauses, 1st wrongful withhold-

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ing, and 2d retaining greater compensation than allowed by law.

The first part of the 8th and 11th assignments relate to a failure on the part of the court to give certain instructions. The 2d, 4th, 5th, 6th, 7th, and part of the 8th 9th and 10th assignments relate to error in the instructions given by the court The 12th and 13th assignments of error are based upon the fact that the verdict was against the overwhelming weight of the evidence. The 3d assignment of error is based upon the refusal of the court to give an instruction which was requested.

We state the ground for rehearing under three heads, and in two views of the case under each head.

1. Do the repeated, uniform and numerous decisions of this Court sustain the opinion in the case at bar? And

2. Do the decisions cited in the opinion sustain it?

To both we do most earnestly but respectfully submit that they do not.

And we shall have nothing to say save to put the correctness of the opinion in the case at bar to the test by comparing it with the former repeated and uniform decisions of this Court.

We understand the opinion in this case to be that this Court thought it was precluded from considering the questions raised in the view that they were not sufficiently technically so by the bill of exceptions.

We understand the line of decisions of this Court to be that all that is required upon which to properly base an exception or objection, or assignment of error, is that

the attention of the trial court should be called to them.

If this is done it is all that is required or needed to be done. This was certainly done in writing in this case under a certain number of heads.

This was an oral charge, spoken off to the jury by the trial court. The court stenographer took it down as the judge talked it off, and wrote it out in long hand, and as soon as it was done we wrote out the exceptions and objections, and which are in the exact words of the assignments of error here, a literal and verbatim copy of the same; and the trial court passed on them, and each of them, and finally put his rulings on them in writing, on the motion in arrest of judgment.

The specified words and parts of the charge and refusal to charge objected to, and then and there excepted to, were set out in writing, and the trial court ruled on each of them in writing, and overruled and disallowed them, and stated at great length and with much argument his reasons for so doing. R. p. 15.

It would thus seem that all the law required was fully complied with; and all we beg for is that this Court will examine, and say whether or not the disallowing of the same was right or wrong on the law and the facts.

We do not understand that the overwhelming weight of the decisions of this Court are in accord with the rules of law as announced in the opinion in the case at bar.

We understand in a criminal case the uniform ruling of this Court is that it will determine the real merits of the case on the law and the facts.

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That it will not simply and solely, on purely strict technical rules as to the form of the pleading, without any merit in them at all, refuse to examine the record, and the question of guilt or innocence on the facts and the law.

It might be in a case simply involving matters of dollars and cents, and of property and land, that this Court might adhere to these real purely technical rules of the form of pleading, without any merit, and even in some cases where such a result might operate seemingly to defeat the ends of justice.

But certainly the great weight of the decisions of this Court do not, as we read them, or understand or see them, we most earnestly and respectfully submit, go to that extent in cases which involve the life and the liberty of the citizen.

It might be so where he was simply subjected to a fine. Or if it was a short imprisonment in a jail of a few weeks or months the rule of law invoked might be so. But in a case like the one at bar, while only called in the statute "a high misdemeanor," but which still carries with it the penalty of depriving the accused of his liberty and all his rights of citizenship, and condemning him to all the infamy, ignominy and never ending shame to him and all his, it cannot be so.

If in the deprivation of the life and liberty the uniformity of the decisions of this Court is that way we fail to see, read or understand it so from the numerous and repeated opinions.

We understand the trend and the great weight of the decisions of this Court to be that in cases involving life

and liberty this Court will always look to the real and true merits of the case on the law and the facts, without any regard to what the simply technical form of the pleading in the record is. In other words, we understand the uniform trend and the great weight of the decisions is that this Court will not take away from the accused his life or his liberty, and all those inalienable rights of citizenship, and seal his doom for all time upon pure technical rules in regard to the simple form or mode and shape of the pleading.

This Court will not sacrifice substance for the sole purpose of requiring compliance with rules for the pure technical form of pleading. But as the court of last resort, the final arbiter, it sits to put aside pure and simple technical form in simple rules for pleading, and reaches and administers the law on the merits and the facts, and for justice sake alone. Sits to reach the substantial ends of justice and right alone, and to administer it without any regard to the pure and simple technical rules for the form of pleading alone.

The learned lawyer, senior counsel in the case at bar for plaintiff in error, whose soul and body was racked with the disease that in a few short weeks after this trial in the lower court caused his sad and untimely death, may have, because of his extreme ill health, inadvertently not drawn his exceptions with all that technical preciseness that would bring it up to the old common law form of rigid technical pleading.

But surely this Court will not decline to examine the questions of law and fact in the record, and determine the guilt or innocence, and will not condemn for an infamous

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crime the accused, and deprive him of his liberty, without an examination, without a hearing, and without a trial, we most earnestly, humbly and respectfully submit.

In the Crain Case Supra there was no instruction. There was no request for instruction. There was no exception. And there was no assignment of error. And yet this Court examined into that case in the very fullest manner and the most minute detail, and reversed it. In that case Mr. Justice Harland said the courts ought not to countenance the careless manner in which records of cases involving the life and liberty of an accused are often prepared,

"Before a court of last resort affirms a judgment of conviction of at least an infamous crime," etc.

"It is not a matter of form only, but of substance in the administration of the criminal law, and is not cured, but involves the substantial rights of the accused."

We would like very much to comment thus at some length on decisions of this Court, cited beyond, but for want of time, and for fear of its being a repetition of the same, we forbear, only begging this Court to consider fully the authorities cited supra.

In the opinion in the case at bar this Court say:

"We cannot regard as error the omissions of the court to give instructions which were not asked."

In Hickory vs U. S. supra Mr. Chief Justice Fuller said:

"Even in that view the exception might be held equivalent to a request for the qualification."

See also other authorities cited beyond.

The opinion in the case at bar says further:

"Nor are the instructions which were given, but not excepted to, subject to review."

Wigborg vs. U. S. 656 Mr. Chief Justice Fuller said:

"Nor was any exception taken, although they are now assigned as error."

"And although this question was not properly raised yet if a plain error was committed in a matter so absolutely vital to defendants we feel ourselves at liberty to correct it." (p. 658.) "And that we may properly take notice of what we believe to be plain error, although it was not duly excepted to." p. 659.

"We are of the opinion that adequate proof to that effect is not shown by the record, and that as the case stood, the jury should have been instructed to acquit them, (p. 660), and after subjecting the rulings of the court below to that careful examination which the discharge of our duty requires."

Agnew vs. U. S. 165 do 52:

"We have carefully explored the evidence and considered the errors assigned, whether pressed in argument or not." Even where four were abandoned, he says.

Davis vs. U. S. ib 375, Mr. Justice Brewer said:

"As it is a criminal case, we will carefully examine the record with all the assignments of error, in order to see that no injustice has been done the defendant."

Acres vs. U. S. 194 to 390 :

"It may be premised that the exceptions to this charge are taken in the careless way which prevails in the western district of Arkansas. But passing this, and considering the charge as properly excepted to," Stevenson vs. U. S. 162 do 315. Mr. Justice Peckham said:

"A review of the evidence at the trial of the defendant in the court below shows that there was error in the refusal of the court of the request of defendant's counsel to submit the question to the jury."

Logan vs. U. S. 144 do 282, Mr. Justice Gray said:

"But the motion in this case appears to have been intended and understood to include an exception. And the same question is distinctly presented by the judge's refusal to instruct the jury as requested and by instructions given by him to the jury."

Hickory vs. U. S. 160 do 413, Mr. Justice White said:

"It is contended by plaintiff in error that these assignments . . . are not sufficiently specific to merit consideration, because they do not point out the exact words of the charge complained of. The assignments are in exactly the same language as were the exceptions taken during the trial and which the record declares defendant presented at the time; that the assignments do not in terms state the precise language used by the court, they yet indicate with sufficient clearness to enable us, from a mere inspection of the charge, to ascertain the particular matter referred to. The rule in relation to the exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court . . as to enable the judge to correct error, if there be any, in his instructions . . and this is also requisite in order that

the appellate tribunal may pass upon the question raised without being compelled to read the record to ascertain it. It is here unquestionably on the very face of the bill of exceptions were taken . . and that the trial court was fully aware of their import and had the opportunity to make such correction, if any, as its judgment may have deemed necessary to prevent the charge from being misunderstood by the jury. This is made out clear not only by the language of the bill of exceptions, but also by the charge itself, which contains a statement by the court, entirely inconsistent with a possibility of there having been any surprise or misconception."

Same case, 151 do 316, Mr. Chief Justice Fuller said:

"The trial judge could not have been in doubt as to the particular part of the charge objected to, and as his attention was called to the matter, could have modified or withdrawn it, if he had thought necessary to do so, and the portion excepted to with sufficient precision, so far as this court is concerned."

"Nor did the exception embrace other than the specified statements objected to."

"Again, the exception was not to the omission of the court to charge upon a particular point, in which case, in the absence of requests that that should be done, it would not have been well taken (R. R. vs. Polk, ante 73), although even in that view the exception might be held equivalent to a request for the qualification and counsel signified out of abundant caution what in their judgment would remove their ground of complaint. We hold, therefore, that the point was sufficiently saved."

Theid vs. Utah, 159 do 521, Mr. Justice Brewer.

"One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so."

Bank vs. Eldred 143 do 298, Mr. Justice Gray.

The exceptions in the case were taken at the trial. They are written out and embodied in a formal bill of exceptions presented to the judge at the same time; allowed and signed by the judge and filed with the clerk during the same term. The bill of exceptions was reasonably drawn up and tendered. It states in writing distinctly the rulings complained of and the exceptions taken, and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed.

In Crain vs. U. S. 162 do 632, there was no exception and no assignment of error either, at all.

But just a few lines in the brief in this court—a very short statement saying, "as is fully shown by an inspection of the printed record." And this Court passed on, decided and reversed that case.

Mr. Justice Harland said: "But an objection is made to the proceedings in the court below which is of a serious character. The record should be a permanent memorial . . and show whether the judgment whereby it was proposed to take the life of the accused, or to deprive him of his liberty, was in accordance with the law of the land. P. 643. In Hoyte vs. Utah, 111 do 579, this court observing that the public has an interest in the life and liberty of an accused person, said: "Neither can be lawfully taken except in the mode prescribed by law. That which

makes the law essential in proceedings involving the deprivation of liberty or life cannot be dispensed with or affected.

"Where the crime charged is infamous in its nature, are we at liberty to guess . . and then guess again.

"Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities on the subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared."

"Before a court of last resort affirms a judgment of conviction of at least an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken. P. 645.

"We may have a belief . . but this belief is not founded upon any clear, distinct affirmative statement of record, but upon inference merely. That will not suffice.',

"We are of opinion that the rule requiring the record of a trial for an infamous crime to show affirmatively', (and counsel add that no error was committed in the charge as given or refusal to charge) "is not a matter of form only, but of substance in the administration of the criminal law, consequently such a defect in the record of a

criminal trial is not cured, but involves the substantial rights of the accused."

"The constitution does forbid the deprivation of liberty without due process of law, and due process of law requires a trial by jury and the finding of the facts by the jury and not by the trial judge, and the record of his conviction should show distinctly—not by inference merely—that every step involved, in due process of law and essential to a valid trial, was taken in the trial court. Otherwise the judgment will be erroneous and cannot be made the basis of judicial action without endangering the just and orderly administration of the criminal law. The present defendant may be guilty and may deserve the full punishment imposed upon him by the sentence of the trial court, but it were better that he should escape altogether than that the court should sustain a judgment of conviction of an infamous crime where the record does not clearly show that there was a valid trial."

Allis vs. U. S., 155, do 122, Mr. Justice Brewer.

"A party must make every reasonable effort to secure from the trial court correct rulings, or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal, and to that end he must be distinct and specific in his objections and exceptions. Rule 4 of this court provides the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and these matters of law and these only shall be inserted in the bill of exceptions and allowed by the court."

Justice itself, and fairness to the court which makes the rulings complained of, require that the attention of

the court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception. 2 Wall, 329.

If it was intended to save an exception as to distinct propositions embodied in the instructions the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed. 111 U. S., 337.

An exception to all and each part of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it.

140 U. S., 239; 120 do, 183; 130 do, 611; 132 do, 172.

Williams vs. U. S., 168 U. S., 390. Decided November 29, 1897, Mr. Justice Harland.

"But other errors are assigned."

"They must be examined, because if any of them affect the substantial rights of the accused a new trial must be the result in each case."

"In our judgment the court erred in what it said to the jury." P. 397. "Assuming (although the record is silent on the subject) that the accused introduced evidence of his general reputation for integrity."

"The representative of the Government saying in open court and presumably in the hearing of the jury."

Bram. vs. U. S., 168 U. S., 532. Decided December 13, 1897. Mr. Justice White said:

That the objection to the admission of evidence having been twice presented and regularly allowed it was not necessary that it should be renewed at the termination of the testimony of the witness. P. 540. It was allowed and regularly noted.

To say that under these circumstances the objection which was twice presented and regularly allowed should have been renewed at the termination of the testimony would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are therefore to be questioned on error. P. 541.

There can be no doubt that the manner in which the exception was allowed and noted fully called attention to the fact that was objected to because . . . and the overruling of this objection is the matter now assigned as error here. Indeed in the argument at bar no contention was made as to the sufficiency and regularity of the exception.

If found to be illegally admitted reversable error will result.

Both these cases in the 168 United States were reversed and remanded with order to grant new trials.

The record in the case at bar is filled with the exceptions taken and reversed to the trial judge's ruling on the evidence. R. P. 21. If after this Court examines the real question in the case and considers them fully it holds there is no error in them, then we can have nothing further to say.

But we do beg that this Court will consider and pass

on them all. In Agnew v. U. S. 52, Mr. Chief Justice Fuller said, in commenting on the Coffin case as to the presumption of innocence; "But in that case the charge of the court was thought not to have given effect to the presumption of innocence."

This is one of the positions in the case at bar.

The trial judge in his charge to the jury said, "so that there is on that point a hopeless conflict in the evidence in its terms and its implications." R. p. 178. This is repeated several times in the charge.

If this be so then the charge of the trial court did not give effect to the presumption of innocence or reasonable doubt either.

And this is certainly contrary to law as announced in the Agnew case above and the Coffin case 156 U. S. 458. The very full opinion by Mr. Justice White.

This is plain error as Mr. Chief Justice Fuller said in the Wigborg cited before.

The opinion in the case at bar quotes from a decision this, "It is sufficient that the court gave no erroneous instructions."

We do not combat this, but earnestly insist and only humbly implore this Court to examine the charge with the errors assigned and we submit that all the instructions complained of show they were manifestly erroneous when viewed in the light of the repeated and uniform decisions of this Court.

Under the statement in the opinion in the case at bar of "We cannot regard as error the omission of the Court

to give instructions which were not asked," is cited Isaacs v. U. S. 159 U. S., 491 criminal case.

But for the proposition it is cited for in the opinion in the case at bar, no decision in any criminal case is cited to support it.

It rests for its authority alone on two decisions cited civil cases.

And again it was passed on simply as an incidental question in the Isaac's case.

The first question in that case was on a continuance. And this Court after giving it the very fullest consideration by a citation of the authorities and review of the charge in full of the trial court say : "There was clearly no abuse of discretion." The second question in the Isaacs' case on the proof as to the corpus delicti.

It was too fully examined and passed on by this court.

The real and true questions of merit in that case on both the law and the facts as made by the plaintiff in error there were fully considered and passed on by this court, although there was no appearance or brief for that plaintiff in error.

And for the third question in a few short lines of that opinion the rule of law as contended for in the opinion in the case at bar is announced.

And then this Court in the Isaacs' case say : "Beyond this, however." Not considering or relying on it at all this Court review in full the charge of the trial court on the real point as there made and held there is no error in it.

Pennock v. Dialogue, 2 Pet. 1, 45, cited in the opinion in the case at bar as sustaining the Isaacs case, is a civil suit. For the infringement of a patent, Mr. Justice Story said: "All the testimony, it is very voluminous, and, as no exception was taken to its competency....either general or for any other purpose, it is not properly before this Court for consideration." He says further there was not the slightest necessity of putting any portion of the evidence in this case upon the record, since the opinion of the Court, delivered to the jury presented a general principle of law.

And you find this case cited chiefly in the reports under the head of patent law-abandonment-infringement.

True it states in a general way the point announced in the opinion in the case at bar.

But the real question, the main question, the principle question, the chief question and issue in that case for the Court to decide was one of patent law. The great question of abandonment in patent cases. What constitutes it etc., and what was an infringement of a patent.

And this Court there decide that real question in that case.

And as we understand the decision has been a controlling authority on those two great questions in patent law of abandonment and infringement ever since.

And so far as the rule of law announced in the case at bar in the 2 Pet. case it only arose incidentally on a question of practice in a civil case and did not go to the merits of the controversy at all.

And Mr. Justice Story said the opinion of the court

presented "a general principle of law." And that general principle of law which it presented was one of patent law. And this court settled it.

R. R. Co. vs. Volk, 151 U. S., 73-78—another civil suit —an action for personal injuries—is the second case in the opinion at bar cited to sustain the rule in the Isaacs case.

The question in the Volk case was contributory negligence. And the rule of practice is announced and authorities cited to sustain it. One from England, a civil suit; the 4 Cranch, 62, case—action for debt; Smith vs. Carrington; the 2 Pet. patent suit, and the cases of Express Co. vs. Kountz, 8 Will., 342—civil suit to recover the value of a lost package of gold dust. This court said: "The case involves two questions—one of jurisdiction and the other on its merits." And after disposing of the question of jurisdiction, says:

"There remains to be considered the merits of the case—the question is one of negligence."

This court says:

"No exception was taken on the trial to the admission or rejection of evidence. And so they were not before the court."

And after thus fully passing on all the questions in the case and deciding them in the course of the opinion the simple rule mentioned is announced.

Shuttle vs. Thompson, 15 Wall., 164—action of ejectment. All the questions in this case were passed on and decided by this court. And incidently the rule is mentioned. But even after it is this court said:

"And in the part of the charge to which exception was taken we perceive no error."

Every single one of them civil cases—not criminal. Or announcing a controlling rule of practice in criminal cases, so far as we are able to understand from the opinions.

We do not gather from them that any idea of criminal cases was considered at all, or intended to be passed upon.

In the Volk case this court passed upon the real questions in that case outside of and beyond any pure idea of practice. This court affirmed the $8,000 judgment, with 10 per cent. added by this court, because it was of the opinion that the appeal was simply for delay only.

Mr. Justice Gray said in the Volk case:

"In this country the rule as to exceptions seems to be more liberal."

So in the Volk case the question stated in the opinion in the case at bar seems to have been only an incidental question of practice made in that record, because the real questions in that case were on exemplary damages, competent evidence, contributory negligence, and the judgment was affirmed with added damages. All the vital questions in that case were considered and decided.

Of course we all bow our heads to the great master mind of the law in our country, Mr. Chief Justice Marshall, who delivered the opinion in the 4th Cranch case in 1807. He was then blazing along nearly a century ago in the wilderness of our country the eternal land-marks of the law.

And true, indeed, it is he settled in that opinion one

of the most vital principles in our jurisprudence. And that was that if a party to a suit or his counsel thought the case before the jury presented a certain question on the law and the facts he had a right to request the trial judge to charge it.

And if the trial judge refused to consider that request at all or to allow it to go to the jury, then if it was a proper request, so determined afterward by this court, then the case would be reversed upon that ground.

Theretofore this principle was unknown to our law.

As Mr. Justice Gray says in the Volk case, this is not now the rule of law on this question of practice in England. Nothing is error except those made at his own suggestions by the trial judge. You have no right to ask his reversal or to ask him to consider instructions or requests to instruct on any question of law or fact, though your request be unquestionably the law and that of the trial court manifestly wrong in its words and on its very face.

This was the one vital principle of law that Mr. Chief Justice Marshall, the grand old giant of the law, was laying down as an immortal rock-bed principle for the jurisprudence of our country to rest upon. It grew out of that undying idea in this grand man's mind to throw around us those safeguards to our imperishable birth claims of personal liberty and individual rights that would last, yes until time was no more, and even on to the shores of eternity itself.

And that any such view would ever be taken that his opinion in that civil case would ever be construed to say

to a private citizen in the face of an infamous charge that for that reason his case could not be looked into or passed upon by this court is simply beyond my comprehension.

Say to a person at the bar, whether just or unjust, we cannot for certain technical rules of pleading look into your case. And you must lose your personal liberty, as we are unable because of those rules to consider your appeal or pass upon it or examine it. And you must suffer for an infamous charge, as by the reason given we cannot look to see whether we should or should not grant you any relief. You must lose all your individual rights of citizenship because we cannot on account of these simply technical rules of the form of pleading, without any regard whatever to the merits on the law or the facts, look into, examine or pass upon the questions of merit or demerit in law or fact, error or no error, in your case.

It may not be your fault, plaintiff in error. It may have been the inadvertent mistake or oversight of your counsel in the court below because of his extreme ill health, which shortly resulted in his death, but whatever the cause may be your case cannot be heard, looked into or examined here, and you must lose your personal liberty and all your individual rights of citizenship and be condemned to eternal doom and infamy and shame to all yours solely and alone because these simply technical rules in regard to the form of pleading have not been complied with by your counsel, and we must decline to see if we can give you any relief.

If this be so then with the deepest sorrow, earnestness and respect we humbly submit and in a spirit of the greatest humility this plaintiff in error is the only one

who ever stood at this bar and was told by this Court that he must be condemned because for the simple rules of technical pleading he could not be heard.

He is the first in the history of this Court who was told he must suffer and lose his personal liberty and all his individual rights of citizenship because the Court could not look into, consider or pass on his case or his rights, simply and solely on account of a non-compliance by his counsel with the technical rules of pleading in regard to their form, and without any regard whatever to any question of merit in his case on the law or the facts.

And God grant that it may never even be told to him. That his young life be never consigned, my God, to what is such a never-ending and living death and living hell. And that his helpless wife and little children be spared, oh God, from such a never-ending and living death and hell of eternal ruin and eternal shame.

We cannot believe it to be intended to be so, and we have never before heard it claimed that an accused should be condemned and refused a new trial and a hearing on the real and true merits of his case alone for the sickness, death, inadvertance, oversight, mistake, inexperience or fault of his counsel in lack of familiarity with or knowledge of the simple technical rules as to the form of pleading and failure to comply with the same. Because his counsel was not sufficiently acquainted with or knew well enough those rules alone to comply with them in writing exceptions or assignments of error. Lawyers are of course no more infallible than others. They make mistakes often as well as others.

But we do know there is a line of cases holding that a

court will not condemn a man for the sickness, death, mistakes, inadvertances, inexperience and oversights of his attorney alone.

But where the record shows many will on this ground alone reverse the case and give the accused a chance to again get a fair and impartial trial for his personal liberty and individual rights and where such mistakes can be obviated.

We recall an unreported case decided by the Supreme Court of the State of Tennessee where it held passing on the provision in the Constitution of the State that the accused was entitled to be represented by counsel, that it meant counsel who were familiar with all the modes of practice in such cases and if the bill of exceptions in the record showed that by reason of sickness or death of counsel, or because of his inadvertence, oversight or mistake it was not properly drawn, that the case for that reason alone was reversed and remanded for a new trial in order that the accused might get a trial on the real and true merits of the case, and where such mistakes can be obviated.

In the opinion in the case at bar under the head:

"Nor are instructions which were given but not excepted to subject to review." To sustain this text two cases are cited.

Tucker vs. U. S. 164 U. S. 170—murder.

In that case this Court in a full opinion passed on all the questions there involved and in three lines at the end of the opinion states the text given.

And the only case cited to sustain the rule is the U. S.

vs. Breitling, 20 How. 252—civil suit against surety on bond.

This Court there says: "The exception brings up the charge of the Court to the jury, but not the admission of evidence which was objected to on the trial, but to the admission of which no exception was noted."

And this Court decided that case on the question involved in it. And incidentally announced this rule of practice as to exceptions to the admisability of evidence in a civil case. It is much like Mr. Justice Story's opinion on the question of evidence in the 2 Pet. patent case.

St. Clair vs. U. S. 154 U. S. 134—murder. This case like all those cases we have found, examined and passed on all the questions in the case. Seven of them before this one was noticed. And this is under the VIII head. In two lines it simply speaks of the proposition and cites the Tucker case alone to support it, and then refuses to sustain the VIII objection, but goes on and rests the ground of refusal on the Penal Code of California—a section there cited, and then passes on the ninth question in the case. The question is here too just incidentally referred to and the overruling of the objection placed on another and entirely distinct ground.

II.

We earnestly but respectfully submit this Court misinterpreted the point we made on the charge which it held was properly excepted to and the exception properly reserved.

We do not at all object to the part of the charge quoted by this Court in the opinion in the case at bar.

It is that part of the charge that follows right along after where the opinion quits quoting it that we think is beyond all question shown to be reversible error in the light of the repeated and uniform decisions of this Court on the question there made; i. e., the invasion and usurpation of the province of the trial judge in his charge, in that after telling the jury there were two questions of fact for them to determine, then he withdraws from them in his very next breath all consideration of the first fact.

To what we object is that it was certainly proper for this question of fact to go with the other to the jury to find.

And not to be found by the trial judge.

He says:

"Now, desiring to get the jury down to the real issue in this case as it comes to you, leaving the jury free to find for itself, the court is of opinion that, considering in reference to either the Government's proof or the defendant's, and with reference to the written evidence or the oral,

"That the defendant was instrumental in the prosecution of these claims in such sense as that if he withheld the money he would be within the provision of the statute and guilty.

"That brings you to the fact, then, of whether or not he did withhold the pension claims."

This was error, because it took from the jury all consideration of the evidence tending to show that the defendant was neither the attorney, agent or person instru-

mental in procuring or prosecuting the pension claim of either Anderson or Bloodson. This being a question of fact, as to whether the defendant was or was not such agent, attorney, or person procuring said pension money, it was the province of the jury and their duty to determine such fact for themselves from the evidence, and the court could not instruct them upon this as matter of law.

Again the trial court says:

"That is the real issue in respect to this Anderson, viz.: Who got the proceeds of that check?"

"If Mr. Humes got and retained the proceeds, or retained any part of it above the Notary's fee, then he is guilty; whereas if Anderson got it that is the end of the case so far as that count is concerned; or if, under the rule stated, you have a reasonable doubt about how that is, the defendant is entitled to an acquittal. R., p 176.

Again he says:

"So that did he withhold from Anderson all or any substantial part of that pension?" R., p. 178.

"If so, he is guilty, and you should convict him; and if not, and if you have a reasonable doubt, acquit him."

Thus it is seen the trial court usurped and invaded the province of the jury in his charge in that nine separate times he withdrew from them the finding and consideration of what he himself first charged was the primary fact that they themselves must find as a condition precedent before there could be any conviction.

Who found this primary fact that it was charged the

jury must find as a condition precedent before there could be any conviction? The trial court; and so stated to the jury.

It may be suggested that in the first part of the charge the court used the words, "leaving the jury free to find for itself, the court is of opinion that," etc.

In the very next breath, where he repeats that charge, does he say again, "leaving the jury free to find for itself, the court is of opinion that," etc. No. There is no even apparent limit on his charge this time. He says: "That brings you to the fact, then, of whether or not he did withhold these pension claims."

What has become of the primary fact that he told the jury they must first find as a condition precedent before there could be any conviction? What is it "that brings you to the fact, then, of whether or not he did withhold these pension claims?"

It was that the trial court had found the primary issue of fact—condition precedent for them which he at first had twice submitted to them, and he so charged them what it was, i. e., that defendant was instrumental in the prosecution of these claims in such sense as that if he withheld the money he would be within the provisions of the statute and guilty.

He next says: "And that is the real issue."

There is no even apparent limit on these words. He does not tell them this time, "leaving the jury free to find for itself, the court is of opinion," etc.

He tells them, "and that is the real issue."

What has become of the primary other real issue—condition precedent—that he himself had twice charged them before, they themselves must first find before there could be any conviction?

He himself has found for them what that primary fact—condition precedent to any conviction—was, many times before and afterward.

And for the fourth time, as if to clinch it, he charges them: "If Mr. Humes got and retained the proceeds, or retained any part of it above the Notary's fee—"

What then is the only sole and solitary condition upon which he puts the case to them on?

"Then he is guilty."

This time does the trial court leave it to the jury to find whether or not the defendant belonged to that class of persons who would be with the provisions of the statute, and his guilt or innocence depended primarily on that as a condition precedent to their right to convict him? No. The trial court has long since in his charge three distinct times passed that issue of fact by finding it himself and so charging the jury, and now he tells them: "If Mr. Humes retained it, then he is guilty."

The trial court has changed it—defendant's guilt or innocence now rests with them alone on the solitary issue of fact as whether or not he retained it.

Does the trial court tell them this time "leaving the jury free to find for itself, the court is of opinion?" No. Leaving out of consideration all things else—he says if Mr. Humes retained it, then he is guilty.

He next says:

"Whereas, if Anderson got it, that is the end of the case, so far as that count is concerned."

"Or, if under the rule stated you have a reasonable doubt about how that is, the defendant is entitled to an acquittal."

Do these two charges look much like leaving the jury free to find for itself, or that the trial court could be much of the opinion that the jury were left free to find for itself whether or not the defendant was instrumental in prosecuting these claims for pensions before the Pension Office?

Again he says:

"So that did he withhold from Anderson all or any substantial part of that pension?"

"If so, he is guilty and you should convict him."

"If not, or you have a reasonable doubt, acquit him."

Do these three charges look much like the jury were left free to find for itself, or that the court was simply expressing an opinion as to whether the defendant was instrumental or not in prosecuting these claims for pension before the Pension Office?

Could language be plainer, showing that the court had time and time again in his charge taken away from them all consideration of such fact, and had time and time again so charged them?

In fact, there was no limit upon the charge, and if one was intended it is strange indeed that so many times the limiting words should have been omitted altogether.

If you examine the charge again you will readily see the plain meaning of it was to the jury this: I charge you that taking all the evidence in consideration, both the

Government's and the defendant's, written and oral, the defendant was instrumental in prosecuting these claims for pension in such sense that if he withheld the money he would be within the provision of the statute and guilty.

If the trial court intended to leave the jury free to find for itself and simply to express his opinion, that is reversable error under the repeated decisions of this court, cited beyond, where it is the finding of the primary fact.

But the use of the expression, leaving the jury free to find for itself, the court is of opinion, is a meaningless nothing when called a limitation on a charge where the judge told the jury that from all the evidence, the Government's and defendant's, written and oral, the defendant was instrumental in prosecuting these claims in such sense that if he withheld the money he would be within the provisions of the statute and guilty.

His reference to it as both the Government's proof and defendant s, written and oral, but fixed it more firmly in the minds of the jury as settling the primary fact by the judge in his charge to them. After stating it in such unqualified terms, if he had said a thousand times, leaving the jury free to find for itself, the court is of the opinion, etc., how was it possible for him to have effaced from their minds the fixed fact as he had stated to them he had found it?

The defendant could not be within the statute and punished for a violation of law, if he violated it, unless the jury first found that he belonged to this class. Yet in the face of so plain a law the judge finds this fact for them.

If he intended to leave the jury free to find for itself and only to express an opinion to which they should pay

not the least bit of heed in the world, why did he tell them,

"Now, desiring to get the jury down to the real issue in this case?" Why he himself had twice before charged them that there were

two real issues in this case.

If he intended to leave to them the finding of the

two real issues in this case?

Why did he tell them:

"Now, desiring to get the jury down to the real issue in this case?"

What had he done with the

other real issue in this case?

If he intended to leave the jury free to find for itself, why in his very next breath did he say:

"That brings you to the fact then, of whether or not he did withhold these pension claims?"

What has the judge in this part of his charge done with

The other real issue in this case?

Then he says,

"And that is the real issue."

Why we are told he intended to leave the jury free to find for itself.

If so, what has he done with the

other real issue in this case?

If he intended to leave the jury free to find for itself, why did he say next, "If Mr. Humes got and retained the proceeds, or retained any part of it above the notary's fee, then he is guilty."

What did the Judge do with the

ther Oreal issue in this case?

Not only did the trial court usurp and invade the province of the jury in this case, and find the first fact for them that he himself had twice before charged that they themselves must first find before there could be any conviction, but he determined for them and so charged them what that fact was, when it was the basis of this accusation—the primary fact—condition precedent to any conviction. In short, if he had reversed his charge and found for them, and so charged them, that from all the facts in the case, the Government's proof and defendant's, oral and written, defendant was in fact guilty of wrongfully withholding pension money from pensioners, the jury could not find guilty unless they found defendant was the agent, attorney or other person instrumental in prosecuting these claims for pension before the Pension Office.

Unless he belonged to that class they could not convict him, although he admitted he withheld the money. Yet the trial court usurped and invaded the province of the jury to such an extent as to tell them what that fact was.

He, in effect, charged the jury that the defendant belonged to that class, and as such he was guilty.

The court, if the defendant had been on trial for murder, had just as well charged the jury he was satisfied, from all the facts, the defendant had done the killing, and their only province was to return a verdict of murder in the first degree. The effect of it is, the defendant has not been tried by the jury. He has been tried by the court and found guilty by the court. He has been deprived of his liberty without due process of law.

In Stevenson vs. U. S., 162 U. S., 341, Mr. Justice

Peckham said: "And yet this question of fact is, under the evidence in the case, determined by the trial court as one of law and against the defendant.

. . . . . .

"But why should the other issue be taken from the jury and they not be permitted to pass upon it as a question of fact?"

. . . . . .

"We only decide that the question should have been submitted to the jury as well as the other question of fact. For the error in refusing to do so, the judgment of conviction must be reversed and the cause remanded to the court below with instructions to grant a new trial."

In Mills vs. U. S., 164 U. S. 646, Mr. Justice Peckham said: "No portion of the charge of the court, under such circumstances, can be said to be harmless if it did not state correctly and fully the law applicable to the crime, even although it may be urged that in other portions of the charge the correct rule was laid down."

"How much of this testimony was credible, and what inference ought to be drawn from it all, were matters for the sole consideration of the jury, and the mere charge taken for proper proof of the crime on the part of the person on trial,"

In Hickory vs. U. S., 160 U. S., 413: "Putting this language in connection with the 'many other charges,' it is justly to be deduced that its effect was to instruct that the defendant was 'guilty,' and therefore the only province of the jury was to return a verdict of guilty."

"It is true that a subsequent portion of the charge refers to evidence . . . as proper to be taken into consideration as evidence. But these qualified remarks did not recall the undue weight which the previous language had affixed to the facts to be considered by the jury."

"On this subject also it is true the charge thus given was apparently afterward qualified by the statement that the jury had a right to take the fact . . . into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction . . . with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as matter of law, the court declared they were entitled to have, that is . . . so well settled as to amount virtually to a conclusive proof of guilt."

In Starr vs. U. S., 1b3 U. S., 626, in considering the power of a Federal court to comment in charging a jury on the evidence, we quoted with approval the language of the Supreme Court in Burke vs. Maxwell, 81 Penn St., 150, saying:

"When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially.

"And if the expression of an opinion upon such evidence became a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The charge given in this case violates every rule thus announced. It was neither calm, nor was it impartial. It put every de-

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duction which could be drawn against the accused from the proof, . . . and omitted or obscured the converse aspect. In so doing it deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth. Nor can it be considered that the language used corrected the error. . . . Indeed, taking the language of the charge which follows the foregoing words, it must have conveyed by the strongest possible intimation the impression to the jury tnat the case before them was controlled by the general rule previously stated to them by the court, although other cases might be an exception to such rule."

"Measuring the correctness of the charge now considered by these principles and authorities, it is at once demonstrated to have been plainly erroneous."

"It magnified and distorted the proving power of the facts."

"Considering the entire context of the charge, it practically iustructed that the facts were . . . conclusive proof of guilt." P. 421.

. . . . . .

"It is apparent that this part of the charge is replete with the errors which we have already found to exist in the matter which we have already considered. But the instruction contains an additional error of so grave a nature that we call attention to it in order to prevent its recurrence."

"The manner of contrasting the testimony of the accused . . . was clearly illegal. . . . This contrast thus made could have conveyed but one meaning to

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the jury, that is, a warning that the testimony of the accused was to be considered by them as of little or no weight because he could be bribed—he could be dragged or seduced into perjury. Such denunciation of the testimony of the accused is without legal warrant. Indeed, this instruction, besides giving rise to this error, was also, if possible, more markedly wrong from the implications which it conveyed to the jury. It substantially said to them the circumstances . . . cannot be bribed, but the defendant can be; therefore, you must consider that these circumstances outweigh his testimony, and hence it is your duty to convict him."

In Allison vs. U. S., 160 U. S., 207, this court says: "The question was for the jury to determine, from all the facts and circumstances adduced in evidence. . . And it was for the jury to test the credibility of the defendant as a witness . . . uninfluenced by instructions which might operate to strip him of the competency accorded by law. We repeat what was said by Mr. Justice Shiras, for the court, in Hicks vs. U. S., 150 U. S., 452. . . . 'And perhaps a judge cannot be considered as going out of his province in giving similar caution as to the testimony of the accused . . . if the judge, to whose lightest word the jury properly enough give great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability . . . The policy of this enactment should not be defeated by hostile intimations of the trial judge, whose duty it is to give reasonable effect and force to the law."

"While the trial judge may not have intended to be understood that the defendant could not prove his defense

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by his own testimony, and had it in his mind simply to warn the jury that they should not rely on the defendant's opinion that his conduct was justifiable, but on the facts, or what reasonably appeared to him to be such, we think these remarks had a much wider scope, and must have been so understood by the jury . . . and it was for the jury to say from the evidence what were the facts."

"And if the jury regarded the remarks of the court as applicable generally to defendant's testimony then defendant was practically deprived of its benefit, and the statute enabling him to testify was rendered unavailing. In our opinion the liability of the jury to thus understand these observations was so great that their utterance constitutes reversible error. Nor was this error obviated by what, some time after, . . . was said by the trial judge. . . . If this could be, in any aspect, treated as a modification of the previous assertions of the court, it was too far separated from that connection to permit us to attribute that operation to it, and moreover, it was in itself erroneous. As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness. P. 21.

"Justice and law demand that so far as reference was made to the evidence, that which was favorable to the accused should not be excluded. His guilt or innocence turned on a narrow hinge, and great caution should have been used not to complicate and confuse the issue. But the charge above quoted ignored the evidence tending to show what defendant's proof was; and invited the jury to

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contemplate the spectacle, . . . unrelieved by allusion to defensive matter, which threw a different light on the transaction.

"If there were evidence, and as to this the record permits no doubt, tending to establish that defendant, etc., . . . then this disquisition of the court was calculated to darken the light cast . . . as defendant claimed them to be, and of this he had just cause to complain, even though there were competent evidence indicating the opposite as frequently intimated by the court—intimations which we fear seriously trenched on that untrammeled determination of the facts by a jury to which parties accused are entitled. P. 213.

"The logical inference was this . . . and another and inconsistent inference could not be arbitrarily substituted by the trial court . . . graphic language of the court and . . . speculation as to his mental process was uncalled for,"

"And it is for the jury and not for the judge, passing upon the weight and effect of the evidence, to determine how this must be. In this case it was essential to the defense that the jury should be clearly and distinctly advised as to the bearing, etc. It is open to criticism, and even extenuating circumstances.

"Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all reference to the conduct of the deceased at the time.

"Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and

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so intermingled with inferences springing from forsenic ardor, that the jury are left without proper instructions, their appropriate province of dealing with the facts invaded, and errors intervene which the pursuit of a different course would have avoided. Case reversed and remanded for a new trial."

In Davis vs. U. S., 160, U. S., 493, Justice Harlan said; "No man should be deprived of his life (and we add or liberty) under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

In Alberty vs. U. S., 162, 508, Mr. Justice Brown said: "But what the facts were was a question for the jury."

In Allen vs. U. S., 157, U. S., 657: "Instruction erroneous in withdrawing from jury questions of fact."

In the opinion in the case at bar one of the statements is that it was certainly proper for the case to go to the jury.

If this be so still it but more clearly to us makes out the correctness of our position that the trial judge made the greatest error in his charge by first telling the jury they must find the two questions of fact and then afterwards not letting the case go to the jury on the first question of fact that he first told them they must find.

He took it away from them, and for this error alone, if for nothing else, the case ought to be reversed and a new trial granted.

If this was not invading the province of the jury and

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usurping it under the repeated decisions of this Court, then we must confess we are unable to comprehend what could be. What a trial judge must do or say to make it so.

III.

It is stated that "we are precluded from considering the alleged fact that the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict," in the opinion in the case at bar.

The enunciation of this principle is certainly against that announced in the Wiborg case, 163 U. S., 656, which states the rule of law on this point to be, as said by Mr. Chief Justice Fuller:

"We are of opinion that adequate proof to that effect is not shown by the record, and that as the case stood the jury should have been instructed to acquit them." P. 660.

There are two cases cited as sustaining this text of the opinion in the case at bar, i. e., Crumpton vs. U. S., 138 U. S., 361—murder.

There were three questions in this case and all were passed on in that case.

Moore vs. U. S., 150 U. S., 57-51—murder.

All the questions in this case were passed on and decided. Then at the end of the opinion in a few lines the rule of the text was stated.

Our appeal to this court is that it will consider and pass itself upon the question of whether there is or not error—real and true errors—in the charge as shown by the assignments.

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If it does not show it is the only like case we have been able to find where it did not so hold.

Whether this court, as we humbly pray it to examine the assignments, will not say the parts complained of show real and true error.

There is nothing in our argument itself that we claim is of great value. We only beg that the decisions of this court in the former cases be considered and examined.

The errors assigned are in conformity with the rules of the many decisions as announced.

And the opinion in the case at bar is not in conformity with those decisions.

We respectfully submit it is not sustained by them. It is in direct conflict with them.

This is a criminal case, a prosecution for an infamous crime, the deprivation of liberty and all the rights of citizenship.

The rule of law and decision is different from that in a civil case.

And this court has never before refused, and will not now, to consider and pass on the questions of real merits of law and facts.

We humbly implore this court to pass on the real questions in this case.

The fifth assignment of error was an error which the trial judge himself confessed he erred in in giving it in charge to the jury, because after allowing them for an hour or so to consider it he then sent for them and withdrew it

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himself because he was satisfied it was so palpably wrong and erroneous.

And yet the court seems to consider this not properly excepted to, although it is assigned as error.

And if it was wrong to give it in charge to the jury—so wrong the trial judge himself withdrew it—then it did wrong, it did injury to the plaintiff in error before that jury, prejudiced his case, and this case should be reversed and remanded that that wrong, that injury confessedly done the plaintiff in error should be righted and corrected.

ASSIGNMENT OF ERROR.

It is respectfully submitted that defendant's case may have been prejudiced by the following instruction: "Among other things, you may consider for what it is worth, the fact, as the case comes to you, that Mr. Humes, so far as it is developed, was doing or attempting to do this work for nothing but the notary's fee, as a question affecting his testimony." It is true, after the jury had been considering of their verdict for some time, his honor withdrew this instruction, and his purpose was to do so in such a way as would leave no effect whatever upon the minds of the jury. This is always difficult, but almost impossible in this case, where the charge is in substance the fraudulent withholding of the money of the pensioner, and the circumstances referred to tend to disparage the business and stain the reputation of the defendant. The tendency was to lower and depreciate. Withdrawing, no matter how fully done, it is submitted, could not remove the effect already produced.

And this serves, it may be better than anything else

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in the record, to show how deep seated was the prejudice on this trial against the defendant, that it almost, if not quite, spread itself to the trial judge. Here is where he admits he made an error against the defendant. And how strange an error it is, too. Because he had found for the jury that the defendant was instrumental in prosecuting these claims for pension in such sense that he was guilty if he withheld any part of the money and was within the provisions of the statues.

The defendant's contention all along has been that he never was agent, attorney, or any other person instrumental in prosecuting these claims for pension before the Pension Office, but that all he ever had done, and the only and sole connection that he ever had had with these pensioners or their claims, was that in his purely official and ministerial capacity as United States Commissioner he had administered to them the oaths to the vouchers, and so certified under his official seal, and had never received one cent from them except the usual notary's fee—fifty cents for each paper.

Now, considering that this is made out by the proof to the satisfaction of the jury, the trial court charges the jury that Mr. Humes, so far as it is developed, was doing this work for nothing but the notary's fee, as a question affecting his testimony.

In other words, if the defendant had made out to the satisfaction of the jury his theory of this case, namely, that he was only acting in any manner connected with these pensioners or their claims in his official capacity as United States Commissioner, and got nothing for it but the usual notary's fee—fifty cents; then the trial court

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charges the jury that they must consider this as a question affecting his testimony.

In other words, if he has made out his case upon this line of defense, they must take this fact to discredit the truthfulness of his statement by. If he was not guilty, because the trial judge told them that as a fact he was instrumental in prosecuting these claims for pension before the Pension Office of these parties, and if he has satisfied the jury that he only acted as notary in swearing them to their papers and so certifying under his official seal and only got the notary's fee, then this charge tells them he is guilty anyhow, and you find him so, whether he is under the statute under which he is indicted or not, because if he has proven a perfect defense you must discredit him by that.

If he has made out his case—made out a perfect defense—proved to your entire satisfaction his innocence of this charge and that he is not guilty, then I charge you, says this trial court, that you must take that as discrediting his statement.

In the history of the world did you ever hear it said before that if a man made out a perfect defense to a charge, that a jury must take that making out of a perfect defense by the accused to discredit him by?

In short, don't believe him anyway, or anything he says.

If he has told the truth, don't believe him anyway, discredit him for and by his telling the truth.

In disposing of the V. assignment of error, on motion in arrest of judgment by the trial court, of course the trial

court, did not think it was error to have left the instruction as given, as he says. To discredit the defendant because he had proven the truth of his contention on this point, why, of course, the trial court did not think this was error.

It was withdrawn, so it could not have possibly hurt the defendant—the trial court says (R., p. 15). It was not its withdrawal that hurt, it was giving it in charge. That is the error well complained of.

Every known principle to criminal law of trial, pleading and practice has been violated in the case at bar; and every elementary principle.

And we speak this not from anything we can say but from the decisions of this Court announcing the rules of law.

And all we wish to do is just to compare the rulings in the case at bar with those opinions to show we are right in our contention.

We go by these opinions in what we say; we have nothing else to say.

The accused is guaranteed a trial by jury and a finding of the facts by the jury, and not by the trial judge. He can't invade or usurp the province of the jury. If he does it is unlawful and this Court will reverse the case for such a plain error.

This is the opinion in the Stevenson case by Mr. Justice Peckham, ante.

Legal effect must be given to the presumption of

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innocence, and guilt must be established beyond a reasonable doubt before there can be any conviction.

This is the law of the Coffin case opinion by Mr. Justice White; and the case will be reversed unless it is done.

And if there was hopeless conflict in the evidence in the case at bar, as the trial judge repeatedly said—was the witness of the law—the presumption of innocence that must stand for the accused until overturned by proof short only of absolute certainty, and beyond a reasonable doubt overcome. It surely was not.

This is truly plain error upon which this case ought to be reversed and remanded for a new trial.

There are certainly limitations on the power of a Federal Judge.

In Starr vs. U. S., 153 U. S., 626, Mr. Chief Justice Fuller called attention to the fact that there were limitations on the power of a Federal court in commenting on the facts of a case, when instructing the jury, limitations inherent in and implied from the very nature of the judicial office.

In Reynolds vs. U. S., 98 ib., 168, Mr. Chief Justice Waite also said on the same subject: "Every appeal by the court to the passions or prejudice should be promptly rebuked, and it is the imperative duty of the reviewing court to take great care that wrong is not done in this way. . . ."

In Hickory vs. U. S., 160 ib., 415, this court say: "Admonished by the duty resting on us in this regard, we feel obliged to say that the charge which we have been consid-

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ering crosses the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prej" udices necessarily called into play.

The judge, to whose lightest word the jury give great weight.

His charge must not be one-sided.

It must not be so as to deprive the plaintiff in error of his right to testify.

To denounce a person on trial charged with such a thing to the jury as a swindler. Is that right?

Read, we implore you, the charge in this case.

If from the first word, the first letter, the first syllable, to the end, it is not an argument for the prosecution and the bitterest denunciation of the accused, we have nothing to say.

He tells the jury in the charge that the discrepancies in the witne-ses for the prosecution are immaterial.

That the intelligence and reliability of these witnesses is, of course a minor matter.

And the written record evidence of the absolute innocence of the plaintiff in error is omitted or obscure altogether from the charge.

There is not a single exception or assignment of error that we cannot put our finger down upon as shown by the record, and side by side with them we can show the decisions of this court repeated, uniform and numerous, that sustain every word that is put in it and justifies them all,

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and we can do nothing else but implore this court to consider them, to pass upon them and to examine them in the light of its own decisions. We can ask for nothing more.

And humbly beg that this poor privilege may be granted; and that this plaintiff in error be not driven from this court for the fault, if it be so, of another, to absolute ruin without a trial, without a hearing and without his case being passed on or considered.

If found to be illegally admitted reversible error will result. This is what Mr. Justice White said in Bram vs. U. S., 168 U. S., 532, decided December 13, 1897, found in the last published report of the opinions of this court—one of its very latest and last utterances.

R. p. 21 in the case at bar shows illegally admitted evidence over the objection of plaintiff in error's counsel.

(Objected to by defendant's counsel as leading).

The Court: "It is a little leading, but this old man moves up so slowly, I wish you would let him lead a little." R., p. 21.

In other words, it is an illegal mode of examining a witness, but in the trial of this man for his liberty the trial court does not sustain the objection to this illegal mode of examining a witnesss in the trial of a man on trial for his liberty, but asks that the District Attorney be allowed to proceed a little illegally. This is the astounding proposition that is made.

The prosecution in this case is based for its proof upon what was attempted to be proven by three witnesses as a statement made by defendant to them. To Anderson when he was alone. To the other two when they were

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together. It is a statement claimed to have been made to them by defendant. And it is undertaken to prove that statement in the nature of an oral admission as having been made to them by the accused in a conversation had with them. We find the law on this point as follows, (Commonwealth vs Knapp, 9 Pick., 507, by Putnam, J.): "In a somewhat extended experience of jury trials we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party. . . .

"It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it; and in some instances it will appear that the witness deposes to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the very best intentions repeating the declarations of the party in his own favor as the fullest admissions of the utter falsity of his claim.

"When we reflect upon the inaccuracy of many witnesses, in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions, and the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony.

"The fact, too, that in the final trial of open questions of fact, both sides are largely supported by evidence of this character, in the majority of instances, must lead all cautious triers of fact greatly to distrust its reliability."

Greenleaf on Ev., p. 237, sec. 200 (13th ed.), says: "With respect to all verbal admissions it may be observed

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that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misunderstood, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party actually did say."

P. 118, he says again: "Very great weight ought not to be attached to evidence of what a party has been supposed to have said; as it frequently happens, not only that the witness has misunderstood what the party said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party actually did say."

Note p. 238: "It is also well settled that verbal ad missions, hastily and inadvertently made, without investigation, are not binding." 17 Mass., 27.

P. 251, Sec. 214: "But here, also, as we have before remarked in regard to admissions, the evidence of verbal confessions is to be received with great caution. For, besides the danger of mistake from the misapprehension of witnesses, misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, etc.

"The zeal, too, which so generally prevails . . . and the strong disposition in the persons engaged in the pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as wit-

nesses . . . all tend to impair the value of this kind of evidence."

The most unreliable of all human testimony, these authorities state the rule of law, is that of an oral admission.

And as the record in this case shows, where it was one of only a few moments' duration in a casual conversation; where the parties stood during it. Where the party sought to be charged was in the very midst of a press of many other business matters with many other persons; and where none of the details were gone into, as all the witnesses say.

Was it deliberately and undestandingly made by the party sought to be charged thereby?

It would seem impossible for it to have been done so from the physical facts, as shown in this case. It was only a few moments hurried talk, all the witnesses agree. It was while they were standing. None of the details were pretended to have been gone into. And it was while the party sought to be charged was in the midst of a press with much other business with many other persons. It would surely seem that it lacked every single element that would go to make it up one of deliberation, and understandingly made.

Was the conversation correctly understood by those who undertook to repeat it? Was it correctly reported?

While it is the most unreliable of all human testimony and is to be so considered, yet it was deliberately made by the party making the admission, and was correctly understood and reported by those undertaking to repeat it, then it was competent legal evidence, and should have been submitted to the jury.

But if it is not deliberately and understandingly made and correctly understood and reported, then it was not legal evidence, and should have been excluded.

If the plaintiff in error was not the attorney or the agent of the two persons here named, as the trial judge said, was not so much as contended for in argument by the prosecution, then if he was instrumental at all, it must be an instrumentality in some such sense as the words used in the statute show either as agent or attorney, and if he was not in that same sense, then he was not within the statute, and so not guilty in fact or law.

If on a fair charge the first trial jury found that plaintiff in error was not the agent or attorney or any other person instrumental in prosecuting the claims of Anderson or Bloodson, how could he be within the statute at all?

And if, as a fact, as they found the plaintiff did not withhold the whole or any part of the sums of money herein specified from Anderson and Bloodson, how could he be afterward found guilty under a forced conviction by the charge of the trial judge, save by usurping and invading the province of the jury?

If in a case where A is charged with murdering B, A is on his first trial found not guilty of murder in the second degree, manslaughter or assault, can you again try him on the same indictment on the charge of murder in first degree and on the charge of the trial court force A's conviction for murder while B is alive and walking around?

For all these questions we beg the consideration of the court.

LOWRY W. HUMES,
Plaintiff in Error.

By JAMES M. GREER,
His Attorney.

I hereby certify that in my opinion the foregoing petition for rehearing is well founded in law.

JAMES M. GREER,
Counsel for Plaintiff in Error.

May 18th, 1898.

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